LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
OCT 25 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-692

DAVID HERNANDEZ MARTIN,

Petitioner,

vs.

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CALIFORNIA

RICHARD G. SHERMAN
LARRY L. SCISSORS
6420 Wilshire Blvd.
Sixth Floor
Los Angeles, CA 90211
(213) 658-6800

Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. _____

DAVID HERNANDEZ MARTIN,

Petitioner,

vs.

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

RICHARD G. SHERMAN
LARRY L. SCISSORS
6420 Wilshire Blvd.
Sixth Floor
Los Angeles, CA 90211
(213) 658-6800

Counsel for Petitioner

TOPICAL INDEX

	Page
Table of Authorities	ii
CITATIONS TO OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS	3
STATEMENT OF THE CASE	4
STATEMENTS OF THE FACTS	6
REASONS FOR GRANTING THE WRIT	6
DISCUSSION	9
I THE WARRANTLESS ARREST WAS ILLEGAL AND UNLAWFUL AND THE EVIDENCE OBTAINED AS THE RESULT OF THE SEARCH INCIDENT THERETO SHOULD HAVE BEEN SUPPRESSED	9
CONCLUSION	22
APPENDIX A	
Opinion of the Supreme Court of the State of California	
APPENDIX B	
Detailed statement of facts for the arrest, search and seizure of defendant	

TABLE OF AUTHORITIES

Cases	Page
Badillo v. Superior Court, 46 Cal.2d 269 (1956)	9
Beck v. Ohio, 379 U.S. 89 (1964)	13
Cunha v. Superior Court, 2 Cal.3d 352 (1970)	8, 16
Henry v. United States, 361 U.S. 98 (1959)	17, 20
Irwin v. Superior Court, 1 Cal.3d 423	16
Johnson v. United States, 333 U.S. 10	18
Ojeda v. Superior Court, 12 Cal.App.3d 909 (1970)	13
People v. Adkins, 273 Cal.App.2d 196	13
People v. Boyles, 45 Cal.2d 652 (1955)	10
People v. Brown, 45 Cal.2d 640 (1955)	10
People v. Castenada, 1 Cal.3d 477 (1969)	22
People v. Cruz, 61 Cal.2d 861 (1964)	9

Cases	Page
People v. Gorg, 45 Cal.2d 776 (1955)	10
People v. Harvey, 156 Cal.App.2d 516 (1958)	13
People v. Haven, 59 Cal.2d 713 (1963)	9, 10
People v. Ingle, 53 Cal.2d 407 (1960)	20
People v. Lara, 67 Cal.2d 365	13
People v. Madden, 2 Cal.3d 1017 (1970)	10, 13
People v. Moore, 69 Cal.2d 674	16
People v. One 1960 Cadillac Coupe, 62 Cal.2d 92	16
Remers v. Superior Court, 2 Cal.3d 659 (1970)	8, 12, 13, 14, 16
Restani v. Superior Court, 13 Cal.App.3d 189 (1970)	13
Terry v. Ohio, 392 U.S. 1 (1968)	16
Thompson v. Superior Court, 59 Cal.2d 65 (1963)	10

Constitution	Page
United States Constitution:	
Fourth Amendment	3
Fourteenth Amendment	3
Statutes	
California Penal Code:	
§496	4
§836(3)	10
28 U.S.C. §1257(3)	2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1973

No. _____

DAVID HERNANDEZ MARTIN,

Petitioner,

vs.

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CALIFORNIA

The petitioner David Hernandez Martin respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California entered in this proceeding on July 10, 1973.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of California, not yet reported in the official reports, appears in the Appendix hereto as Appendix A. No opinion was rendered by the trial Court below.

JURISDICTION

The judgment of the Supreme Court of the State of California affirming petitioner's judgment of conviction was entered on July 10, 1973. That judgment became final on August 10, 1973. This petition for certiorari is filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

1. Whether the observation of business machines and unidentifiable bulky items within a car driven by one previously arrested for receiving stolen property constitutes probable cause to arrest.

CONSTITUTIONAL PROVISIONS

The constitutional provisions involved are the Fourth and Fourteenth Amendments to the United States Constitution. The Fourth Amendment provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment provides in pertinent part as follows:

> (1) "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of

the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner was charged by information in Los Angeles Superior Court Number A167784 with two counts of receiving stolen property in violation of California Penal Code §496. He pled not guilty and after an evidentiary hearing wherein his motion to suppress as evidence the allegedly stolen property, on the basis that it was obtained as the result of an illegal search and seizure, was denied, tne matter of guilt was submitted to the Court on the testimony contained in the transcript of the preliminary hearing. He was thereupon

found guilty as charged and, pursuant to disposition previously entered into, was subsequently fined $5,000.00 and sentenced to ninety days incarceration in County Jail. Petitioner thereupon filed a timely notice of appeal.

On December 27, 1972, the judgment of conviction imposed below was affirmed by the Court of Appeal, which ruled against petitioner-appellant on the merits of his claim that the evidence used against him was obtained as the result of an illegal search and seizure. A petition for hearing in the matter in the California Supreme Court was thereupon filed on petitioner's behalf on February 8, 1973. The California Supreme Court granted that petition, and on July 10, 1973, after a full treatment of the search and seizure issue, decided that matter adversely to petitioner and affirmed his conviction. A copy of the opinion of that Court is attached hereto as Appendix A and is incorporated by reference herein as though set forth in haec verba. Under California State law, the judgment of the California Supreme Court became final on August 10, 1973.

STATEMENTS OF THE FACTS

A summary of the record below concerning the underlying basis for the arrest, search and seizure complained of here is fairly set forth in the opinion of the California Supreme Court, at pp. 3-4 thereof. A more detailed statement of facts is attached hereto as Appendix B for the convenience of this Honorable Court.

REASONS FOR GRANTING THE WRIT

The basic fault of the rationale employed by the California Supreme Court is that the Court there first characterizes events which exhibit no signs of criminality, as being inherently criminal in nature, and then further draws unwarranted inferences therefrom. Contrary to that opinion, it is simply submitted here that the circumstances under which the defendants were observed could not reasonably support a strong suspicion that an offense had been committed. The contrary determination by the California Supreme Court, given only the events observed, is uncalled for as having no

basis in logic, fact, or law, and can only reflect a sub silento application of the long rejected principle that a search may be justified by what it reveals.

Here, it is only when it is established that items observed in the station wagon were in fact stolen, can it be said that "the activities here were highly unusual." Given the events which occurred prior to arrest, such a characterization exhibits a lack of touch with the realities of day to day life. It would thus appear that the Court below has never moved a business, or moved from its place of residence, or helped someone else to so move; nor has it ever purchased items at an auction in lots, or moved items simply to furnish a business or home or office; nor has it ever delivered items from a merchandizing establishment or engaged in any activities remotely resembling those described above. Again, it is only when it is discovered that some of the items were stolen does no innocent explanation come to mind.

As the Court itself noted, the record here only discloses that the officer observed Martin, about whom the officers

had learned from superiors and from an intelligence card, but whose original source was never established, that he was an active receiver of stolen property, driving a heavily laden station wagon. The Court correctly categorized this information as equivalent in quality to the uncorroborated tip of an unreliable informant that Martin was an active receiver of stolen property. This information clearly, however, did not purport to note that, at the time Martin was observed, he was then engaged in some criminal activity and in fact the record shows that the officer had no specific known criminal activity in mind when he commenced his investigation. It seems clear therefore that the additional information later gathered cannot rise to the status of probable cause to arrest, which would validate the subsequent search.

In retrospect, that the Court below would validate the search here reflects a basic misapplication of its own decisions in Remers v. Superior Court (1970) 2 Cal. 3d 659 and Cunha v. Superior Court (1970) 2 Cal.3d 352. Inroads of this nature are taking place every day in trial courts

across the land. We submit that it is not the law that any anonymous informant who communicates to officers that a person is an active receiver of stolen property will subject that person to arrest if he is observed driving a heavily laden car. The manufacture of an anonymous informant is so easy to obtain, that were this the law, the real effect would be that any person who drives on any occasion a heavily laden car will be subject to arrest. This Honorable Court should grant the instant writ to insure that such will not take place.

DISCUSSION

I

THE WARRANTLESS ARREST WAS ILLEGAL AND UNLAWFUL AND THE EVIDENCE OBTAINED AS THE RESULT OF THE SEARCH INCIDENT THERETO SHOULD HAVE BEEN SUPPRESSED

Because there were warrantless arrests and searches in this case, the burden was upon the People to justify the arrests and searches. (People v. Cruz, 61 Cal.2d 861, 865 (1964); Badillo v. Superior Court, 46 Cal.2d 269, 272 (1956); and People v. Haven,

59 Cal.2d 713, 717 (1963).) And it is axiomatic that "A greater showing or probable cause is required to justify an arrest without a warrant than to justify a search pursuant to a warrant." (People v. Madden, 2 Cal.3d 1017 (1970).

Under California law, a peace officer may make an arrest without a warrant "whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed." California Penal Code §836(3). The question of whether or not "reasonable cause" is present is not one left to the arresting officer, but rather a determination to be made by the court after hearing the officer's testimony on the facts or information known to him at the time of the arrest. (People v. Gorg, 45 Cal.2d 776, 782 (1955), People v. Boyles, 45 Cal.2d 652, 656 (1955).) An otherwise illegal arrest and search cannot be justified by what it turns up. (People v. Brown, 45 Cal.2d 640, 643-645 (1955); and Thompkins v. Superior Court, 59 Cal.2d 65, 68 (1963).)

If, therefore, the arrests of Martin and Prizant were unlawful, then the Superior Court erred in denying the motions of petitioners to suppress the evidence.

Ostrom, who had never seen Martin before the day of the arrest, first saw him driving a station wagon on La Brea Avenue at 2:30 p.m. in the afternoon. He recognized him from a photograph on an intelligence card which indicated that Martin had previously been arrested and was apparently a known receiver of stolen property. Ostrom did not know who had made the entries on Martin's card or the basis for the information contained thereon. He also received information from two other officers concerning Martin that he was active as a receiver of stolen property and had "on prior occasions" been arrested for that crime. This information was two months old.

Clearly, the information possessed by the officer at this point was insufficient to furnish any probable cause for an arrest. Prior related arrests or convictions have been given short shrift by the courts as is pointed out by the California Supreme Court

in Remers v. Superior Court, 2 Cal.3d 659, 668, 669 (1970):

> "We have held that a prior related conviction, when known by the arresting officers, has 'at best only a slight tendency' to establish a present violation of the law (People v. Gallegos, 62 Cal.2d 176, 179 [41 Cal.Rptr. 590, 397 P.2d 174]; see People v. Reeves, 61 Cal.2d 268, 274 [38 Cal.Rptr. 1, 391 P.2d 393]); obviously, a prior related arrest where there is no conviction must have even less than a 'slight tendency' to establish a present violation of the law....Similarly, we should not allow police officers to utilize arrests made on unfounded charges as a basis for estimating a particular individual's criminal involvement and then utilize the resulting estimate in determining the reasonableness of an arrest and search of that individual."

Moreover, the source of Ostrom's information was never shown to have been, as

characterized in People v. Adkins, 273 Cal. App.2d 196, 198, "from other than the imagination of an officer who does not become a witness."

It is now well established by a long series of Court of Appeal cases, and recognized as sound in People v. Lara, 67 Cal.2d 365, Remers v. Superior Court, supra, and People v. Madden, 2 Cal.3d 1017, 1021 (1970), and the cases cited therein, that while it may be perfectly reasonable for officers to make arrests or searches on the basis of information furnished to them by other officers, when it comes to justifying the total police activity in a court, the People must prove that the source of the information is something other than the imagination of an officer who does not become a witness. (See Restani v. Superior Court, 13 Cal.App.3d 189, 195-7 (1970); Ojeda v. Superior Court, 12 Cal.App.3d 909, 920 (1970); and People v. Harvey, 156 Cal. App.2d 516, 523 (1958).)

Thus, the information possessed by Ostrom clearly furnished no basis for the arrest of either of the defendants in this matter. (See Beck v. Ohio, 379 U.S. 89 (1964).)

Ostrom additionally felt that Martin's vehicle was overloaded because of the way that it bounced (the photographs of the vehicle did not reveal any overloading) and observed Martin driving into the subterranean garage, enter a Ford Torino, and drive out of the officer's sight. Martin later returned with Prizant in a Rolls-Royce, went to the Oldsmobile, removed an adding machine from the rear portion, and placed it in the back seat of the Rolls-Royce. The officer had no knowledge of any burglaries from which the office equipment might have been obtained; did not know who Prizant was, did not know who lived in the building serving the subterranean garage, and had no knowledge that any of the items of evidence had been stolen. The officer did not determine that any of the items had been stolen until after the appellants were arrested and taken to the police station.

The actions of the appellants were clearly as consistent with innocent activity as with criminal activity. As the California Supreme Court has pointed out, in Remers v. Superior Court, supra:

"'To constitute probable cause for arrest, a state of facts must be known to the officer that would lead a man of ordinary care and prudence to believe, or to entertain a strong suspicion, that the person arrested is guilty.' (People v. Hillery, 65 Cal.2d 795, 803 [56 Cal.Rptr. 280, 423 P.2d 208], and cases cited). As with any intrusion upon an individual's personal security, 'simple' good faith on the part of the arresting officer is not enough: and 'in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' his suspicion. (Terry v. Ohio (1968) 392 U.S. 1, 21-22 [20 L.Ed.2d 889, 905-906, 88 S.Ct. 1868]; see People v. Collins, 1 Cal.3d 658, 662 [89 Cal.Rptr. 179, 463 P.2d 403].)"

Where the events are as consistent with innocent activity as with criminal activity,

a detention based on those events is unlawful (Irwin v. Superior Court, 1 Cal.3d 423; People v. Moore, 69 Cal.2d 674; People v. One 1960 Cadillac Coupe, 62 Cal.2d 92), and, as pointed out in Remers v. Superior Court, supra, "a fortiori," an arrest and search based on events as consistent with innocent activity as with criminal activity, is unlawful.

Although specialized knowledge possessed by the officer might render suspicious what would appear innocent to a layman, the test remains whether the circumstances would warrant a man of reasonable caution--who possessed such knowledge--in the belief that the action taken was appropriate (Cunha v. Superior Court, 2 Cal.3d 352, and Terry v. Ohio (1968) 392 U.S. 1, 21-22).

We respectfully submit that the observations and information possessed by Officer Ostrom was far less than the observations and information possessed by the officers in Remers v. Superior Court, supra, and in Cunha v. Superior Court, supra, and that the circumstances here were insufficient to validate the arrests of appellants.

We turn now to the observations of Officer Ostrom with respect to what he saw within the Oldsmobile station wagon between the times that Martin left the garage in a Ford Torino and returned with Prizant in a Rolls-Royce. The testimony on this point was unusually conflicting. Ostrom had originally testified at a preliminary hearing that he observed a green blanket covering some unknown items (R.T. pp. 19-20). It was still his testimony on the motion to suppress in the Superior Court that he could not determine what was under the blanket while Martin was gone (R.T. p. 21). On the motion to suppress, the officer testified that he could see certain items on the rear seat of the Oldsmobile which were not under the green blanket. In either event, the officer had no knowledge that any of the items in the Oldsmobile were stolen and had no knowledge of any burglaries in which the items might have been taken.

In Henry v. United States (1959) 361 U.S. 98, the United States Supreme Court had occasion to deal with a quite similar situation. F.B.I. agents investigating a

theft from an interstate shipment of whiskey had received information of an undisclosed nature from the defendant's employer concerning defendant's implication with interstate shipments. The agents observed him when he placed some cartons in his car without being able to determine the size, number, or contents of the cartons. After that, defendant's car was stopped by the agents, the defendant was heard to say, "It's the G's," followed by a request to his passenger in the car to tell the agents that he, the passenger, had picked the defendant up. The agents searched the car and seized the cartons found therein. They later learned that the cartons contained stolen radios and placed defendant under arrest.

The United States Supreme Court reversed the judgment of conviction opining that "arrest on mere suspicion collides violently with the basic human right of liberty."

The Supreme Court, citing Johnson v. United States, 333 U.S. 10, which held that the smell of opium coming from a closed room was not enough to support an arrest and search without a warrant, pointed out

preliminarily that an arrest is not justified by what the subsequent search discloses, and held, at 361 U.S. 98, 103:

> "...riding in the car, stopping in an alley, picking up packages, driving away--these were all acts that were outwardly innocent. Their movements in the car had no mark of fleeing men, or men acting furtively."

This Court concluded that on the record there was far from enough evidence to have justified a magistrate in issuing a warrant.

The arrests of defendants herein occurred during the daytime on a day when the courts and District Attorney's Office were open. We submit that the information and observations of Ostrom would not have justified the issuance of a warrant for the arrest of either defendant or the search of any vehicle.

The officer did not ascertain that anything seized was stolen until long after the arrest of defendants and after they had been taken to the police station. All of

the actions of defendants herein were, as were the actions of the defendant in Henry v. United States, supra, entirely consistent with lawful activity, and served to provide no probable cause for the arrest of the defendants, or either of them.

We do not believe that it could fairly be said that when Ostrom arrested defendants there was more evidence tending to prove the commission of a crime than that which showed innocent behavior. The question of what constitutes reasonable or probable cause was delineated in People v. Ingle, 53 Cal.2d 407, 412-413 (1960), where the term is defined as follows:

> "Reasonable or probable cause for an arrest has been the subject of much judicial scrutiny and decision. There is no exact formula for the determination of reasonableness. Each case must be decided on its own facts and circumstances. (Authority cited). Reasonable cause has been generally defined to be such a state of facts as would lead a man of ordinary care and prudence to believe and conscientiously

entertain an honest and strong suspicion that the person is guilty of a crime. (Authority cited). Probable cause has also been defined as having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt. (Authority cited). It is not limited to evidence that would be admissible at the trial on the issue of guilt. (Authority cited). The test is not whether the evidence upon which the officer acts in making the arrest is sufficient to convict but only whether the person should stand trial. (Authority cited)."

There is certainly no more evidence for than against in the present factual situation.

We submit that no magistrate would have issued a warrant for the arrest of either defendant and it is clear that a warrantless search and seizure must at least reach the standards of an arrest and

search where a warrant was presented. (People v. Castenada, 1 Cal.3d 477, 481-2 (1969).

State simply, our position here is that while the circumstances observed by the officers may have been sufficient to raise a suspicion of criminal activity, they clearly were insufficient to rise to the status of "probable cause".

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of California and the judgment there rendered should be reversed.

Respectfully submitted,

RICHARD G. SHERMAN

LARRY L. SCISSORS

Attorneys for Petitioner

C O P Y

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

THE PEOPLE, Plaintiff and Respondent, v. DAVID HERNANDEZ MARTIN et al., Defendants and Appellants.	FILED JUL 10 1973 G.E. BISHEL, Clerk S.F.Deputy Crim. 16790 (Superior Ct. No. A 167784)

Defendants David Hernandez Martin and M. Nick Prizant appeal from orders granting probation following the convictions of each on two counts of receiving stolen property. (Pen. Code, § 496, subd. 1.)[1/] The causes were submitted to the court on transcripts of the preliminary hearings for its determination of guilt or innocence in accordance

1/ All statutory references herein are to sections of the Penal Code unless otherwise specified.

with a negotiated disposition as to sentence.[2/] Prior to the submission defendants had unsuccessfully moved to set aside the information (§ 995) and to suppress evidence (§ 1538.5).

Defendants contend that there was no probable cause for their arrests and accordingly, evidence seized incidental to such arrests should have been suppressed pursuant to their motion therefor. Defendant Prizant additionally contends (1) that there is insufficient evidence to sustain his convictions, and (2) that the trial court exceeded its jurisdiction by imposing an excessive fine as a condition of probation. We conclude, inter alia, (1) that

---

2/ The defendants had separate preliminary hearings and the transcript of each such hearing was submitted on the issue of guilt as to each defendant. The negotiated sentence disposition was to the effect that in the event defendants were found guilty they would not be sentenced to state prison unless such sentences were suspended. Defendant Martin was placed on probation for five years on the condition, among others, that he spend the first 90 days in the county jail and pay a $5,000 fine. Defendant Prizant was placed on probation for five years on the condition, among others, that he pay a $10,000 fine.

although submission on the transcript of a preliminary hearing may in some instances appear to be tantamount to a plea of guilty (In re Mosley (1970) 1 Cal.3d 913), the evidence contained therein, in the absence of receipt of additional evidence, must in and of itself be sufficient to support a finding of guilt beyond a reasonable doubt, and (2) that a defendant so convicted may challenge the sufficiency of the evidence on appeal.

We hold, accordingly, that Martin was lawfully convicted as to each count; that Prizant was lawfully convicted as to one count and that there is insufficient evidence in support of the conviction of the remaining count. As the order granting probation to Prizant must be reversed we do not reach the issue of the claimed exercise of excessive jurisdiction.

On the afternoon of April 13, 1970, Police Officer Ostrom while on routine patrol observed an Oldsmobile station wagon heavily laden with unidentified objects. The officer recognized Martin on the basis of prior information obtained from a police

"intelligence card."[3] Ostrom followed Martin into an underground garage and observed him as he parked the station wagon and drove off in a second vehicle.[4] The officer called for assistance and remained at the scene. He approached the station wagon and looked through its windows, observing several business machines on the rear seat along with some bulky, covered items in the rear cargo area. After approximately one-half hour the officer observed

---

3/ The officer had seen the car approximately two months prior to the date he saw Martin driving the station wagon. The card contained a picture of Martin and information that Martin was a "known receiver of stolen goods" who had been arrested for such activity on several occasions. The card did not indicate whether Martin had been convicted nor did it indicate the source of the information. The officer initially reviewed the intelligence card after being alerted by another officer that Martin was actively receiving stolen property.

4/ The garage was located under a multi-unit apartment building wherein, it was subsequently determined, Prizant was a tenant. The garage area was used for the parking or storage of numerous vehicles and was not closed off to the public.

Martin as he returned in a vehicle driven by Prizant. Martin unlocked the station wagon, removed one machine and transferred it to the rear seat of Prizant's vehicle. At this point Ostrom and a fellow officer stepped forward and arrested both Martin and Prizant for receiving stolen property. The officers seized the machines and other materials in defendants' vehicles.

The items recovered from the station wagon as well as the machine recovered from the rear of Prizant's vehicle were later determined to have been stolen although at the time of the arrests the officers were not aware that there had been a recent theft of business machines. The officers possessed neither arrest nor search warrants.

We consider first defendants' contention that there was no probable cause for their arrest and that the fruits of the search conducted incident to the arrests should have been suppressed. As the trial court has ruled on the motion to suppress, after holding an evidentiary hearing pursuant to the motion, all factual conflicts must be resolved in the manner most

favorable to the court's disposition on the motion. Probable cause exists when a state of facts known to the arresting officer would lead "a man of ordinary care and prudence to believe, or to entertain a strong suspicion, that the person arrested is guilty." (People v. Hillery (1967) 65 Cal. 2d 795, 803; see also People v. Lara (1967) 67 Cal.2d 365, 373-374.) A mere hunch or a good faith belief on the part of the arresting officer is not enough; he "'must be able to point to specific and articulable facts which . . . reasonably warrant'" his suspicion that an offense has been or is being committed. (Cunha v. Superior Court (1970) 2 Cal.3d 352, 356.) Further, an arrest and search based on events as consistent with innocent as with criminal activity are unlawful. (Remers v. Superior Court (1970) 2 Cal.3d 659, 664.)

We have above recited the circumstances of the officer's prior knowledge of Martin's activities and his later suspicious conduct.[5/] The presence of a number of

---

5/ The officer's knowledge of Martin's prior activities would not, alone, provide probable cause for his arrest (Remers v. Superior Court, supra, 2 Cal.3d 659, 668;

(Continued)

business machines in the rear of the station wagon, the switch of automobiles, the transfer of one of the machines in the basement garage of a residential complex, all lent credence to the officer's belief that a crime was then in progress. (See People v. Wright (1957) 153 Cal.App.2d 35.) This belief found further support in the officer's independent investigation of official police records which disclosed that Martin had been active as a receiver of stolen property. Such information was entitled to as much, if not more, weight than that of a tip from an unidentified informant. (See People v. Siegfried (1967) 249 Cal.App.2d 489, 493; People v. Superior Court (Thomas) (1970) 9 Cal.App.3d 208, 210.) The totality of these circumstances would clearly lead a man of ordinary care and prudence, who

---

5/ Continued: People v. Gallegos (1964) 62 Cal.2d 176), particularly where the People have not shown the reliability of the sources of the information (People v. Lara, supra, 67 Cal.2d 365, 374). However, that knowledge can be used, in connection with other information, to support a finding of probable cause for arrest. (People v. Buchanan (1972) 26 Cal.App.3d 272, 292; see also United States v. Harris (1970) 403 U.S. 573, 582.)

had the same information and observed the same conduct as did the officer, to entertain a strong suspicion that an offense had been committed or was in progress.[6/] Defendants' contention that the evidence was unlawfully seized must thus be rejected.

We next consider Prizant's contention that there is insufficient evidence in support of his convictions. The People argue that this contention is not cognizable on appeal because the submission of the case on the transcript of the preliminary hearing is tantamount to a plea of guilty. Issues going to the sufficiency of evidence cannot, as a general rule, be raised on an appeal from the ensuing judgment of conviction following a plea of guilty. (See §§ 1237, 1237.5.)

6/ Unlike those in Remers v. Superior Court, supra, 2 Cal.3d 659 and Cunha v. Superior Court, supra, 2 Cal.3d 355, the activities here were highly unusual and not as indicative of innocent as well as criminal activity. Both Remers and Cunha involved activities which, in the street milieu in which they occurred, could not have been said to have been out of the ordinary, unusual or inherently suspicious.

A submission on the transcript of the preliminary hearing has, for certain purposes, been equated to a guilty plea in prder to guarantee that certain rights of a defendant be duly protected. Before submission a defendant must, inter alia, be advised that by submitting his case in such a manner he effectively waives his rights to a jury trial, to confront witnesses and to present evidence in his own behalf. (People v. Levey (1972) 8 Cal.3d 648; In re Mosley, supra, 1 Cal.3d 913.) We have never held, however, that a submission on the transcript constitutes a waiver of the right to challenge on appeal the sufficiency of the evidence in support of a conviction.

The rationale upon which we have held that a defendant who enters a guilty plea waives his right to an appellate challenge based on insufficiency of the evidence (see People v. Ward (1967) 66 Cal.3d 571, 574; People v. Warburton (1970) 7 Cal.App. 3d 815, 821), follows from the defendant's implied admission that the People have established or can establish every element of the charged offense, thus obviating the

need for the People to come forward with any evidence. (See People v. Jones (1952) 52 Cal.2d 636, 651; People v. Johns (1959) 173 Cal.App.2d 38, 42; People v. Stewart (1969) 1 Cal.App.3d 339, 343.) There is no rationale, however, which warrants the finding of an implied admission of the existence of each element of a charged crime merely because the accused agrees to a determination by the court as to the existence of such elements on the evidence presented earlier at a preliminary hearing. Moreover, as appears below, the record in the instant case clearly negates such an implication.

Prizant maintained throughout the entire proceedings that he was not guilty. His submission on the transcript of the preliminary hearing was with the understanding that were he to be found guilty and sentenced to prison the court would suspend imposition of sentence. The court indicated at the time the matter was submitted that it was then inclined to a finding of guilt but that it would have to review again the transcript prior to making such a determination. Thus, defendant never conceded, even by implication, his guilt and the court itself

recognized that such guilt was a matter which must be found, if at all, by the judicial process and then only if the record justified such a finding.

The People's reliance on People v. Sanchez (1972) 24 Cal.3d 664 for the proposition that Prizant cannot here challenge the sufficiency of the evidence is misplaced. In Sanchez the defendant submitted the case on the transcript of the preliminary hearing notwithstanding an unequivocal statement by the trial judge that upon such a submission the defendant would be found guilty.[7/] Moreover, in the particular circumstances of that case a determination was made that the submission was in fact intended as a guilty plea and the admonitions necessary to a valid plea of

---

7/ The submission was further conditioned upon an express understanding of the punishment to be accorded. Defendant was immediately found guilty upon submission and the terms of the negotiated disposition were carried out. It appears that the reason defendant submitted on the transcript rather than plead guilty was to preserve a right to challenge on appeal the validity of a search pursuant to a warrant. Such tactic, however, was unnecessary. (Id., at p. 672, fn. 3.)

guilty were given by the court. (Boykin v. Alabama (1968) 395 U.S. 238, 242-244; In re Tahl (1969) 1 Cal.3d 122, 132; see also In re Mosley, supra, 1 Cal.3d 913, 916, fn. 10.)

Aside from exceptional circumstances such as those appearing in Sanchez a trial court cannot abdicate the heavy responsibility imposed upon it to determine, on the record, the question of guilt presented on a stipulated transcript.[8/] Whenever a defendant waives trial and submits his guilt or innocence on the transcript of a preliminary hearing the trial court must weigh the evidence contained in the transcript and convict only if, in view of all matters properly contained therein, it is persuaded beyond a reasonable doubt of the defendant's guilt. In view of the foregoing it is clear that Prizant, by submitting the question of his guilt on the transcripts

---

8/ In a broad sense Sanchez did not present an exception to the rule as it was expressly understood that the court was not to make any further finding on the record. To the extent that Sanchez is contrary to the views expressed in this opinion it is disapproved.

of the preliminary hearing, cannot be held to have waived his right to challenge the sufficiency of the evidence on appeal.

We turn now to the question of whether there is sufficient evidence to support Prizant's convictions of two counts of receiving stolen property, the first based upon the business machine found in the rear of his vehicle and the second based upon the machines found in the rear of Martin's station wagon. The standard which is applied in weighing the sufficiency of evidence is not whether guilt was proved beyond a reasonable doubt but whether there is substantial evidence in support of the findings of the trier of fact. (People v. Redmond (1969) 71 Cal.2d 745, 755.) Substantial evidence must be more than evidence which merely raises a strong suspicion of guilt as mere suspicion will not support an inference of fact. (Id., at p. 755 and cases cited there.)

To establish guilt of the offense of receiving stolen property proof of three elements is required: the property must have been stolen, the accused must have received it in his possession, and he must

have known that it was stolen. (People v. Kunkin (1973) 9 Cal.3d 245, 249; People v. Vallee (1970) 7 Cal.App.3d 167; People v. Wheeldin (1969) 276 Cal.App.2d 744; People v. Stuart (1969) 272 Cal.App.2d 653.)

The record clearly demonstrates that there is substantial evidence in support of Prizant's conviction of the receipt of stolen property as to the business machine discovered in the rear of his vehicle. The machine's status as stolen property is not in dispute. Prizant's possession of the machine is established by the fact that not only was it in the rear of his vehicle but it was placed there in his presence. The requisite knowledge that the machine was stolen may be established by the circumstances surrounding its receipt. (See People v. Jackson (1970) 14 Cal.App.3d 57; People v. McNeal (1963) 212 Cal.App.2d 731.) Possession of a stolen item in and of itself is a factor which could assist a reasonable person in formulating a strong suspicion that the recipient knew the item was stolen. In addition to the possession of the machine there were here attendant the unusual circumstances surrounding its transfer and the

presence of a number of other similar machines of which Prizant was aware. These factors amply support the trial court's finding that Prizant had the requisite knowledge that the machine in the rear of his vehicle was stolen. Thus there is sufficient evidence in support of the conviction as to that count of the information.

The record, however, is completely devoid of any evidence in support of Prizant's conviction on the count charging that he received the stolen machines located in the rear of Martin's vehicle at the time of his arrest. Prizant clearly did not have possession of those machines nor was there any evidence that he had aided or abetted Martin in receiving, concealing, or withholding such machines.[9/] Mere

---

9/ The transcripts of the preliminary hearings reveal that Prizant had had no access to Martin's vehicle and fail to establish any contact between the defendants other than the meeting which took place immediately prior to the transfer. The fact that Martin's car was parked in the garage under Prizant's apartment building cannot be deemed to have given Prizant constructive possession over the contents of a locked vehicle belongint to Martin. The most which can be inferred from the location of the

(continued)

access or proximity to stolen goods is not enough to infer possession (People v. Zyduck (1969) 270 Cal.App.2d 334.) Thus, although Prizant's knowledge that the machines in the rear of Martin's car were stolen might be inferred, there is a total lack of proof as to the essential element of possession of those machines. The conviction on the count charging that Prizant received the stolen property which was found in Martin's vehicle thus must be set aside. (See People v. Schroeder (1968) 264 Cal.App.2d 217.)

Prizant was granted probation on condition that he pay a $10,000 fine. The fine was presumably $5,000 for each count of which he was convicted.[10/] As the order granting probation must be reversed and the cause remanded for the purpose of rearraignment for probation and sentencing, we may presume that a new order of probation, if

---

9/ (Continued) transfer point is that it was convenient for the purpose of the transfer of the single machine to Prizant.

10/ We have so presumed as the statutory limitation on the amount of a fine which may be imposed for each violation of section 496 is $5,000. (See § 672.)

any, will conform to law.

The order granting probation as to defendant Martin is affirmed. The order granting probation as to defendant Prizant is reversed, the conviction as to Prizant on count II is set aside and the cause remanded for further proceedings in accordance with the views expressed herein.

WRIGHT, C. J.

WE CONCUR:

McCOMB, J.
TOBRINER, J.
MOSK, J.
BURKE, J.
SULLIVAN, J.
*MOLINARI, J.

*Assigned by the Chairman of the Judicial Council

APPENDIX B

APPENDIX "B"

About two months prior to April 13, 1970, Dale Ostrom, a police officer for the City of Los Angeles assigned to the Detective Bureau, Special Investigation Section, received information regarding appellant David Hernandez Martin (hereinafter referred to as Martin) from another officer. He sought out Martin's "intelligence card" and viewed a picture of Martin. The officer had been advised by two other officers that Martin was active as a receiver of stolen property and had been arrested for that crime on prior occasions. On April 13, 1970, Ostrom observed Martin at Lanewood and La Brea Avenues at approximately 2:30 p.m., placed him under surveillance, and followed him to another location. He noticed that Martin's car appeared to be heavily laden (C.T. pp. 151-154).

Martin drove from where he was first observed to 7224 Hillside where he parked his Oldsmobile in a subterranean garage. Martin entered a Ford Torino and drove away. The officer entered the garage on foot; he relayed "this information" to

fellow officers, was joined by another officer in the garage, and remained watching the Oldsmobile (C.T. pp. 155-156). At about 3:15 p.m., the officer observed the co-defendant Michael Nick Prizant (hereinafter referred to as Prizant) drive into the garage in a Rolls Royce with Martin as a passenger. They parked behind the Oldsmobile, Martin got out, went to the Oldsmobile, removed an adding machine, and placed it into the Rolls Royce (C.T. 156-157). The officer had previously observed several "business machines" in the Oldsmobile station wagon (C.T. 157). The officer arrested Martin and a short time later arrested Prizant. He later searched the Oldsmobile "to determine the nature of the contents and determine if the contents were, as I suspected, stolen property." He discovered sixteen business machines, checked them against burglary reports, and learned that a "large majority" had been reported stolen. He subsequently determined that all of the machines were stolen (C.T. 158-159).

On cross examination, Officer Ostrom testified that he did not recall whether

the "intelligence card" recorded any convictions of Martin and did not know whether the card recorded Martin's last arrest or whether the officer gained such information through his conversations with the other officers. He admitted having testified at the preliminary hearing of Martin on May 27, 1970, that Martin's last arrest could have been at least ten or twelve years ago. He had never seen Martin prior to the date of the arrest (C.T. 159-160).

It was stipulated that pages of the preliminary hearing transcript might be read into the record for the purpose of impeachment, and defense counsel read into the record page 38 commencing at line 21 of the preliminary hearing transcript and page 39, where the officer testified that Martin's arrest could have been more than ten or twelve years ago. The officer continued on cross examination that he did not know how long ago Martin's arrest had been and did not know the results of the arrests and that it could have been that Martin was released upon insufficient evidence on each occasion (C.T. 161-162). Ostrom continued that Martin was not

driving erratically on the date of his arrest; he was not aware of any particular burglary in which Martin was supposed to be involved; had no knowledge of the place from which the machines had been taken; and did not know who lived at the Hillside address. The officer testified that after Martin left the Oldsmobile, he walked close to the car and observed several machines in the back seat (C.T. 163-164). Defense counsel read the officer's testimony given at the preliminary hearing of co-defendant Prizant on July 29, 1970, from the reporter's transcript of those proceedings at page 66, wherein the officer had previously testified as follows:

"Q. During that period of time, did you search the Oldsmobile?

A. I did not.

Q. Did you examine the Oldsmobile?

A. I looked at it from a distance of 5 or 6 feet.

Q. And you still could not see anything but the green blanket; is that correct?

A. I saw that the green blanket was covering some unknown items."

Officer Ostrom admitted that he had so testified (C.T. 164-165) and that it was his testimony now that he could not determine what was under the blanket when Martin was gone (C.T. 166). When Martin returned with Prizant, Martin unlocked the rear door of the Oldsmobile and appeared to obtain the adding machine from the rear seat portion of the car. The officer did not recall having testified at the previous preliminary hearing that Martin had obtained the adding machine from the cargo area of the station wagon (C.T. 167); he did not take it from under a blanket and the officer did not notice the machine in the car when he had looked previously. He could not recall that keys were taken from Martin's pocket and the Oldsmobile unlocked after Martin's pocket and the Oldsmobile unlocked after Martin's arrest, but could not say that it did not happen; he could not see the items that were under a green blanket but could see certain items that were not under the blanket (C.T. 168-169). Defense counsel thereupon read from page 40 of the preliminary hearing transcript of May 27, 1970, where the officer had testified that Martin had lifted a green

blanket which was covering said objects in the rear seat and cargo compartment of the station wagon, and the officer testified that he had been in error in thusly answering that question at the preliminary hearing and that he had not seen Martin lift any green blanket; that this point had been brought to his attention prior to seeing photographs which had been taken of the station wagon but that the photographs had reinforced the error in his mind (C.T. 169-170). Officer Ostrom testified that it was his recollection at "this time" that the adding machine was in the back seat portion of the car not covered by anything and that his testimony at the preliminary hearing that Martin had lifted a green blanket covering certain objects was erroneous (C.T. 170-171). The officer testified that he observed business machines in the area between the back of the front seat and the front of the back seat and that the cargo compartment behind the back seat contained other bulky items which were covered. He would not tell what those items were; he saw three or five items in the back seat which were uncovered (C.T. 171-172). The

officer asked Martin certain questions and Martin indicated that he wanted to speak to an attorney; he did not ask Martin for permission to search the Oldsmobile station wagon because he "wasn't too concerned whether he granted permission or not." Defense counsel read into the record from page 48 of the May 27, 1970, preliminary hearing transcript wherein the officer had testified that he had asked Martin's permission to search the Oldsmobile prior to the search and that Martin replied that he wanted to talk to an attorney. The officer did not recall giving the said testimony at the preliminary hearing although it was stipulated that he had so testified (C.T. 173-174).

Martin and Prizant were arrested on a Monday; the District Attorney's Office and courts were open; no effort was made to obtain a warrant to search the vehicles. After arresting Martin and Prizant, Prizant asked permission to go to his apartment so as to store some valuables that had been contained in the Rolls Royce. The officer went to the apartment with Prizant and walked through the rooms. Martin's car

was searched in Hollywood one-half an hour to one hour after Martin's arrest and two or three miles from the place of arrest, in the absence of Martin. "Many things" were removed from his vehicle without a warrant (C.T. 175-176). When the officer first saw Martin, he could not see what was in the car; he had testified at the preliminary hearing on July 29, 1970, that he did not recall a wire mesh divider between the back seat and cargo area of the station wagon but now did testify that the vehicle had been specially constructed with a "dog cage" separating the cargo compartment from the rear of the back seat; that he realized this after testifying at the preliminary hearing; and that one-half an hour to forty-five minutes (a very generous estimate) elapsed from the time of Martin's arrest until he ascertained that the business machines had been stolen (C.T. 178-180).

On cross examination by counsel for Prizant, Officer Ostrom testified that after arresting Martin and Prizant he went first to Prizant's apartment and then directly to the police station; Martin and Prizant were booked; that until he got to the police

station he had no information concerning the machines or concerning any "particular activities on behalf of Mr. Martin or of Mr. Prizant;" that he did not know who Prizant was until the time of Prizant's arrest or until after Prizant was arrested; that the information concerning the machines being stolen came to him roughly one to one and one-half hours later, and after the arrests of Martin and Prizant (C.T. 180-183).

On continued cross examination, Ostrom testified that he did not know on what information the entries on the "intelligence card" that he saw relating to Martin were based or which if any officer had made the entires, and did not know upon what information the officers who made statements to him relative to Martin had based their statements (C.T. 183-184).

On re direct examination by the People, Ostrom testified that he did not know the date of Martin's last arrest and that it could have been any time within the last twelve years; that it was his understanding that Martin had been arrested for receiving; when he first saw Martin's automobile it

appeared overloaded and very low on the axle; that the items covered by the green blanket were in the cargo compartment and the green blanket did not extend past the divider so as to cover the items in the rear seat; and nothing taken from the Ford Torino which was searched several miles away from the scene of Martin's arrest, was offered into evidence (C.T. 184-190).

The "intelligence card" relating to Martin, being a 6" x 8" white card and containing a description and a photograph of Martin was marked People's Exhibit 1, and a group of six photographs of the Oldsmobile station wagon which had been driven by Martin, were numbered Exhibits 2 through 7. Ostrom testified that the card contained the letters R.S.P. which to him signified "receiving stolen property." This card was part of the officer's "probable cause." It was stipulated that the photographs depicted the Oldsmobile on the date of arrest except that the green blanket covering certain items had been removed and that one office machine had been removed from the left middle seat (C.T. 198-205).

On re cross examination by counsel for Prizant, Ostrom testified that while he had testified at the preliminary hearing on July 29, 1970, that he had examined the Oldsmobile from a distance of 5 or 6 feet and that in response to the question, "and you still could not see anything but the green blanket; is that correct?" he had replied, "I saw that the blanket was covering some unknown items." He stated that he had been in error in certain portions of his testimony regarding the existence of "a barrier" and regarding the existence of certain items which were not under the blanket at the time he viewed the car on foot (C.T. 206-208).

On further re cross examination by counsel for Martin, Officer Ostrom testified that the "intelligence card" on Martin did not indicate the disposition of any arrests of Martin and when questioned by counsel for Prizant, stated that during all of his testimony at the preliminary hearing and at the hearing on the motion to suppress in the Superior Court, all of his references to an "intelligence card" were to the card marked Exhibit 1 and not to any other cards or

photographs. Exhibits 1 through 7 were received into evidence (C.T. 208-212).

Ostrom further testified that while People's Exhibit 3 (a photograph of the Oldsmobile taken from the right side) did not depict an overloaded car, he thought that the vehicle was overloaded because of "the way the vehicle bounced" as it proceeded on the roadway (C.T. 213-214). Questioned by the court, Ostrom testified that he did not look at or see any Intelligence Division Report which had been referred to on the "intelligence card" of Martin, and that certain numbers contained on the intelligence card indicated that the fingerprints of Martin were in the files of the F.B.I. and C.I.I.; that whenever a man gets arrested in the City of Los Angeles, he would automatically get a Los Angeles Police number, an F.B.I. number, and a C.I.I. number (C.T. 214-216).

SINCE 1908
THE BRIEF SHOP
10844 VENTURA BOULEVARD
NORTH HOLLYWOOD, CA. 91604
LAWYERS BRIEF SERVICE
LEGAL & COMM. PRINTING